

ONEIDA COUNTY BOARD OF ADJUSTMENT – PUBLIC HEARING

Tuesday, May 13, 2014

1:00 P.M. – Committee Room 2, Second Floor

Oneida County Courthouse, Rhinelander WI 54501

Chairman Harland Lee called the meeting to order at 1:00 p.m. in accordance with the Wisconsin Open Meeting Law.

Roll call of Board members present: Phil Albert, “here”; Bob Rossi, “here”; Harland Lee, “here”; Guy Hansen, “here” and Norris Ross, “here”. John Bloom was excused.

County staff members present: Peter Wegner, Assistant Zoning Director and Julie Petraitis, Secretary III.

Other individuals present: See Sign in Sheet.

Chairman Harland Lee stated that the meeting will be held in accordance with Wisconsin open meeting law and will be tape-recorded and sworn testimony will be transcribed. The Board of Adjustment asks that only one person speak at a time because of the difficulty in transcribing when several people are talking at once. The Board of Adjustment is made up of five regular members and two alternates, one being present today, who will take part in the hearing until the public hearing is closed, at which time alternate will take part in the deliberation. Anyone wishing to testify must identify themselves by name, address and interest in the appeal and shall be placed under oath.

Chairman Harland Lee swore in Peter Wegner, Assistant Zoning Director, Attorney John Rhode, Attorney Timothy Melms, Mrs. Skye and Mr. Fugle

Secretary Phil Albert read the notice of public hearing for Appeal No. 13-014 of Harry and Dorothy Skye, Robert Swett and Michael Fugle, owners requesting an area variance to pave a portion of Birch Point Lane, located within 75ft of the OHWM of the Wisconsin River, contrary to Section 9.94 (A)(1) and 9.95 (A) (1) of the Oneida County Zoning and Shoreland Protection Ordinance, as amended April 24, 2013. The properties are located at 4145, 4141 and 4132 Birch Point Lane, being described as part Government Lots 10 and 11, Section 25, T37N,R8E, PIN ‘s NE 24-17, NE 247-18 and NE 247-19, Town of Newbold, Oneida County, Wisconsin.

The Notice of Public Hearing was published in the Northwoods River News, on March 25 and April 1, 2014; and was posted on the Oneida County Courthouse bulletin board on March 21, 2014. Mr. Albert provided the proof of publication; and noted that the media was properly notified.

The Oneida County Board of Adjustment Rules of Procedure, Section 178.05(12), Chapter 17, Oneida County Code of Ordinance, provide that a timely appeal shall stay all

proceedings and furtherance of the action appealed from, unless such stay would cause imminent peril to life or property.

The Board of Adjustment will conduct an onsite inspection of the property involved in this appeal beginning at approximately 10 am prior to the hearing. Pertinent property boundaries and locations of existing and proposed structures shall be clearly identified. A representative or the appellant must be present. The inspection shall be open to the public.

Copies of appeals and related documents are available for public inspection during normal business hours at the Planning and Zoning Office, Oneida County Courthouse, Rhinelander, WI 54501. The Oneida County Zoning and Shoreland Protection Ordinance is available on the Internet at <http://www.co.oneida.wi.gov/>.

Chairman Harland Lee stated that the Board will hear testimony from the appellant/agent first and then the opposition. Following that, the appellant and opposition will have an opportunity for rebuttal and then closing statements. The public hearing will then be closed from further testimony. Consideration and additional questions can be asked by the Board members of the appellant or the opposition during deliberations. You may stay for the disposition of the appeal. Upon conclusion of the deliberation of the Board, the Chair will call for a motion and a second, and a roll call vote will be taken for the decision of the Board.

Secretary Albert stated that all media outlets were notified of the public hearing and the onsite inspection was conducted at approximately 10:10 – 10:15 a.m. on May 13, 2014. The property owners, Mike Fugle and Dorothy Skye were present along with four Board members and one alternate, Attorney John Rhode, Attorney Timothy Melms, Pete Wegner and Diann Koshuta from the Planning and Zoning Office.

Secretary Albert stated that in terms of observation the property boundaries were poorly marked. The road right-of-way was not marked due to the constraints of the property lines. The well and sanitary facilities were marked. The outline of the construction was marked 75' from the ordinary high water mark. The topography is rolling with paved areas rolling through the terrain. The gate is an entrance to the Skye property. The road out from the Fugle property is gravel and curved. There is potential erosion from the paved area. There are multiple homes with a boathouse on the Skye property.

SWORN TESTIMONY-APPELLANT.

Chairman Lee informed the appellants and their legal representatives of the procedure of the public hearing.

Mr. Fugle started the testimony by informing the Board that where the van was parked this morning there is a slope going downward toward his home and garage. He further stated that all the paving that is there was there prior to he and his wife purchasing the home three years ago. Mr. Fugle stated that removing that portion of pavement and replacing it with gravel would mean that gravel would flow back toward the house because that is where the water flows. He further stated that the main reason the idea of paving came about was that the Skye's maintain the road and the corner in question continually washes out and is a real challenge in the winter because it gets frozen over and cannot be scraped down. This causes challenges for emergency and delivery vehicles. Finally Mr. Fugle stated that where the road ends it drops down pretty precipitously down into the river. His view is that regardless of if there is gravel or pavement there will be water running into the river. The blacktop will end up with less debris running into the river than gravel.

There was discussion as to whether there is a formal road agreement stating that the Skye's maintain the road. There is not.

There was a brief discussion on when the blacktop may have been done on the Fugle property. Mr. Fugle believes the lower loop, which is outside the 75', was done in the mid 1990's.

There was discussion of the Town taking the road over. Mr. Fugle stated he had a conversation with Mark Fetzner about that and they have no interest in it. The road is too narrow and there is no turn-around.

Attorney Timothy Melms, representative for the appellant's, brought Mrs. Skye to the table.

Mrs. Skye stated that she has been a resident of Oneida County for almost 30 years. She and her husband bought the property where they reside now in 2005. Mrs. Skye stated that she and her husband have maintained the road since they purchased the property and they have always had problems with it washing out during rainstorms and spring thaw.

Mrs. Skye informed the Board that after a few summers with the gravel washing out during rainstorms they talked with Musson's about their options. Musson's told them they could bring in fill and pack it and it would last for an undetermined period of time or they could re-contour the area and be sure it would be maintained by paving the area. So the Skye's hired Musson's to pave. The flow of the water now goes toward a vegetated area in the middle of the driveway which is a learning area for students at Nicolet College. This was done in approximately 2007. This is also about the time that the deer were eating all the plants and they hired out to put in the fence and gate with arbors to keep the deer out.

Mrs. Skye told the Board that they have gotten permits for the boathouse, shoreline restoration, remodeling etc. Not getting permits for the driveway and fence/gate was totally inadvertent.

Attorney Melms stated that the next issue with the Skye property is a trash bin within 75' of the OHWM. Mrs. Skye said that it is a critter proof garbage can storage in an area that is accessible to the garbage truck. She explained that in the past she and her husband had been on-call schedules with their work and couldn't always have the trash out on time that is why they have the bins located where the garbage person can access them.

Mr. Lee asked if it could be located someplace else. Mrs. Skye stated that if it were moved anywhere else on the property it would be closer to the water than it is now.

Mr. Lee asked that the appellant address the three criteria on the appeal form.

Discussion was held on other locations for the driveway on the property and if there were any harm to the public where it is located now. Mrs. Skye stated that where the driveway is now it cannot be seen by people on the water and gravel is not washing into the river now that it is paved. Due to the physical layout of the property there is no place else for the driveway.

In terms of the portion of the road that is not paved at this time. Mrs. Skye believes it would be a hardship to her and her husband and a harm to the environment if it were not paved.

Mrs. Skye also stated that there is no other location for the gate and fence based on the peninsula of the property. She stated that the placement of the gate, fence and trash box creates no harm to the public.

Mr. Albert asked Mrs. Skye about the slope on the road/driveway. Mrs. Skye stated that the portion of the driveway that is closest to the river is pitched a bit at the narrowest part. As you go down further it is accentuated to go to the center. Mrs. Skye stated that they have diverted approximately 80% of the flow.

Mr. Albert asked Mrs. Skye how often the gate is open and shut. Mrs. Skye stated that the gate is shut almost all the time to keep the dog in and other animals out.

Mr. Albert stated, by looking at the contour map, that if the road they are requesting to pave be better centered it would be further away from the water on either side. Mrs. Skye stated that if it were repositioned it would be in the Swett's front yard.

Mr. Fugle stated that the Swett's have a retaining wall, on that corner that is being talked about, to keep the house from washing toward the river. There is nowhere further to go left with the road.

Mr. Hansen confirmed the age of the homes and when the road was established.

Jess Spiegelhoff, a neighbor, testified that he witnessed the erosion on Birch Point Drive. He is in favor of the pavement of that portion of the road.

Hal Berndt, neighbor, testified that he is also in favor of the pavement of the road.

Attorney John Rhode, representative for the County, asked Pete Wegner, Assistant Zoning Director, what he feels are violations of the Ordinance on the Fugle, Skye and Swett properties.

Mr. Wegner stated that the paved area in front of the Fugle property and the paved area, gate and trash bin on the Skye property all fall within 75' of the ordinary high water mark of the Wisconsin River. Mr. Wegner provided a map to the Board (Exhibit A). These are all contrary to Section 9.94, OHWM Setbacks and Special Zoning Permission for Structures in Shoreland Setback and Section 9.95, Shoreland Vegetation Protection Area which requires that the 35' buffer remain natural and not be disturbed. There are a few places where both apply.

A series of photographs were submitted to the Board (Exhibit B) of the Appellant's properties showing the violations.

Exhibit C shows the proposed area to be paved.

Exhibit D is a comparison of the gravel driveway as it existed in 2006 to the paved driveway shown on a permit in 2009. Mr. Wegner suggested that the configuration is slightly different. The Board noticed that there were two more buildings on the second photo.

Attorney Rhode asked Mr. Wegner to recap, for the Board, the practical and environmental concerns of pavement as opposed to gravel.

Mr. Wegner stated that pavement is defined as a structure and the Ordinance requires structures to be greater than 75' to the OHWM. One of the purposes of the Ordinance is to regulate the amount of impervious surface and construction close to the water. Mr. Wegner believes that gravel is less impervious than pavement. Mr. Wegner feels that with pavement there would be a higher velocity of runoff that could do damage to the 35' buffer area. He feels, in most cases whether it is gravel or pavement, the 35' buffer exists and is vegetated and will filter out any debris or runoff that comes off either surface.

Attorney Rhode asked Mr. Wegner if he had any additional comments regarding the uniqueness of the physical limitations of the property. Mr. Wegner stated that he feels that the Appellant's could argue that there are physical property limitations. However,

they have had use of the road for 20 years, as it goes into the Skye property, the physical property limitation doesn't really have any effect.

Attorney Rhode stated that there was also testimony about the road washing out which somehow makes this situation unique. He asked Mr. Wegner if he had any comments about the road washing out when it was gravel or if it goes back to being gravel.

Mr. Wegner believes there are areas of the road that could be re-graded or use a better type of gravel that could be compacted. Right now there is sand coming up through the gravel which creates more wash-out. He feels that with a little more maintenance to the gravel a lot of the drainage problems could be eliminated.

Attorney Rhode asked Mr. Wegner about the potential harm to the public interest if the variance were granted. Mr. Rhode stated it has been represented that having pavement would benefit the river by reducing run-out / wash-off. He asked Mr. Wegner if he had comments on that.

Mr. Wegner stated that pavement would increase the amount of run-off. Some of the gravel would take up the water. He said whether it is gravel or pavement there is a vegetative buffer that will filter out anything that is coming off either surface.

Attorney Rhode said that there was testimony that whether it is pavement or gravel it cannot be seen by the public. He asked if Mr. Wegner had an opinion on that. Mr. Wegner stated he had not viewed the property from the water.

Attorney Rhode asked Mr. Wegner if he had any other comments about the harm to the public if the variance to pave the road is granted. Mr. Wegner said he had no other comments.

Attorney Rhode asked Mr. Wegner if there would be an unnecessary hardship to the applicants if the pavement is not permitted. He stated that it was represented that access is limited in the winter with iciness and dangerousness as being a hardship to both Mr. Fugle and the Skye's. He asked if Mr. Wegner had a comment on that.

Mr. Wegner stated that since it has been there so long that they have had reasonable use and it is not a hardship. He said as far as it being gravel or paved you could make an argument that gravel will have better traction in the winter rather than asphalt. On top of that, Dr. Patel lived in that house for probably 20 years and he was able to traverse back and forth on that road.

Attorney Rhode stated that there has been testimony that if the pavement has to be removed there will be additional wash-out into the garage and parking area on the Skye property. He asked if Mr. Wegner had any opinion on that.

Mr. Wegner stated that it is a possibility. He feels that it could be re-graded to the center of the vegetated circle to eliminate a lot of that concern.

Attorney Rhode asked Mr. Wegner if he had any comments regarding the uniqueness of the physical property limitation as far as the gate/fence and trash bin are concerned.

Mr. Wegner stated that the gate really isn't necessary. It doesn't fall within the unique physically property limitations because the gate is not necessary to gain reasonable use of the property. As far as the garbage bin, there are other locations on the property where it can be placed meeting the applicable setbacks. He believes there are other options to gain reasonable use of the property.

Attorney Rhode stated there was testimony trash bin discourages scavengers that might scatter debris and the gate protects the plants from deer and the Nicolet classes come out to study and that the gate and trash bin are not viewable to the public. He asked if Mr. Wegner had any comments on that or if there were any harm to the public.

Mr. Wegner said he does not believe those could be used to prove that there would be no harm to public interest. There are other options available to move them back beyond 75' and other options to control any pests that would be on the property other than placing a structure less than 75' to the OHWM.

Attorney Rhode asked if the gate and trash bins were to be removed if it would cause unnecessary hardship to the property owners.

Mr. Wegner stated that that reasonable use of the property can be obtained in compliance of the Ordinance without a variance. Reasonable use of the property would not justify a gate to keep the deer out.

The Board held discussions on the request to pave the road.

Motion by Phil Albert, second by Bob Rossi to grant the variance to pave the road as requested. On roll call vote: Norris Ross, "aye"; Guy Hansen, "aye"; Harland Lee, "aye"; Bob Rossi, "aye" and Phil Albert, "aye". The motion carried.

The Board held discussion on whether or not the gate should stay or be removed.

Motion by Guy Hansen, second by Bob Rossi that the gate remains as is. On roll call vote: Phil Albert, "aye"; Bob Rossi, "aye"; Guy Hansen, "aye", Norris Ross, "nay" and Harland Lee, "aye". The motion carried.

The Board discussed the existing paved area.

Motion by Norris Ross, second by Guy Hansen to grant the variance for the major part of the driveway with the removal, to make a curve, with a mitigation plan submitted to the County to prevent the bank from further erosion. On roll call vote: Phil Albert, "aye"; Bob Rossi, "aye"; Guy Hansen, "aye", Norris Ross, "aye" and Harland Lee, "aye". Motion carried.

The Board discussed the garbage bin.

Motion by Harland Lee, second by Bob Rossi to move the trash bin to a compliant location. On roll call vote: Phil Albert, “aye”; Bob Rossi, “aye”; Guy Hansen, “aye”; Norris Ross, “aye” and Harland Lee, “aye”. The motion carried.

3:15 pm - The meeting was adjourned on a motion by Phil Albert and second by Bob Rossi; and all members voting aye.

Harland Lee, Chairman

Phil Albert, Secretary